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IN THE

Supreme Court of the United States

October Term, 1974

NO. 75-511

H. B. BUSTER HUGHES, INC.

VS.

OCEAN DRILLING AND EXPLORATION COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FRANCIPANE, REGAN & ST. PEE'
3324 N. Causeway Boulevard
Metairie, Louisiana 70002
Kenneth L. Sanders
Chester Francipane
Wayne H. Scheuermann

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H. B. BUSTER HUGHES, INC.

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The petition of H. B. Buster Hughes, Inc., (Hughes) prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered in these proceedings on May 7, 1975, and the rehearing denial entered on June 4, 1975.

OPINION BELOW

The opinion of the Court of Appeals, as yet unreported, appears at Appendix A, infra, pp. 11-31. There was no formal opinion of the District Court. Pertinent portions of the oral opinion are reproduced at Appendix B, pp. 32-34.

JURISDICTION

The judgment of the court below (Appendix A) was entered on the 7th day of May. A petition for rehearing

was denied on June 4, 1975 (Appendix C pp. 35-36) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

(1) Whether or not maritime law or land law applies to a contract of indemnity involving services of laborers and repairmen whose services are performed aboard a vessel.

(2) Whether or not a contract whereby a vessel owner is relieved of liability for his own negligence is against public policy.

(3) Whether or not as a matter of law a vessel owner may obtain a valid contract of indemnification for his own negligence from an individual or company whose economic power is far below that of the indemnitee.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

This case involving a question of jurisdiction and the application of federal maritime law to contracts for labor and services provided aboard a vessel (two vessels) Article 3 Section 2 of the United States Constitution and 28 U.S.C.A. Section 1333 both as set forth in Appendix D.

STATEMENT OF THE FACTS

As a result of the negligence of an employee of Ocean Drilling and Exploration Company (ODECO) a vessel known as a round barge overturned causing injuries to several individuals resulting in Jones Act suits filed by the various individuals against ODECO and by a claim by ODECO for indemnification for its own negligence under

a contract between ODECO and Hughes. Hughes is an oilfield contractor who is in the business of supplying labor and materials for use by the oil industry. ODECO is a multilateral corporation engaging in various aspects of oil drilling and exploration, handling and storage The individuals injured were supplied to ODECO by Hughes and were performing services for ODECO aboard the round barge. The indemnification agreement in question arises from a master service contract under which Hughes provided laborers and services to ODECO.

Hughes alleges in defense 1) the contention that the indemnity agreement indemnifying ODECO for its own negligence was void as against public policy and 2) the defense that the indemnification agreement should be invalidated as having been obtained by ODECO as a result of ODECO's superior bargaining power.

During the course of the trial Hughes entered into evidence testimony establishing the vast economic differences between ODECO and Hughes as well as evidence concerning the inability of Hughes as a labor contractor to obtain work without first agreeing to provide indemnity to the oil companies. (See Appendix E)

Although the testimony clearly established that Hughes had a total economic net worth far less than the value of the round barge in question which round barge was only one of a fleet of various vessels owned by ODECO the District Court ruled that there was no differences in economic bargaining power between Hughes and ODECO and thereby found that Hughes had not been overreached even though no testimony had been presented into the record to show that Hughes and ODECO had the same bargaining abilities and that Hughes could obtain work

without the necessity of granting indemnity to ODECO or to some other company similarly situated. No comment was made by the District Court as to the applicability of maritime law to the contract in question. The District Court merely concluded that an agreement to indemnify a vessel owner for his own negligence was not against public policy.

On appeal to the Fifth Circuit Court of Appeals the same issues were raised at which time the Court of Appeals ruled that this contract between Hughes and ODECO was governed by Louisiana law not maritime law and further upheld the District Court's determination that there was no overreaching of Hughes by ODECO. In deciding that Louisiana law was applicable and not maritime law the Court referred Hughes to the earlier decision of the Fifth Circuit in *Dickerson v. Continental Oil Company*, 449 F.2d 1209, Certiorari denied by this Court 405 U.S. 934, 92 S.Ct.942, 30 L.Ed. 2d 809.

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that this Court should grant the writ applied for in that the decision of the Fifth Circuit Court of Appeals directly conflicts with earlier decisions in the Fifth Circuit Court of Appeals, decisions of this Court concerning jurisdiction of matters maritime and decisions of this Court concerning indemnification agreements by vessel owners.

In *Rodrigue v. Aetna Casualty & Surety Company*, 395 U.S. 352, 89 S. Ct. 1835, 23 L. Ed. 2d 380 (1969) this Court determined that by virtue of 43 U.S.C. Section 1331, et seq., the law of the adjacent state would apply to incidents occurring aboard fixed platforms upon the outer continental shelf of the United States insofar as that law

was not inconsistent with federal law. However, as was pointed out by the Fifth Circuit Court of Appeals on Page 8 of its printed opinion (see Appendix A) the accident out of which the original suit for indemnity arose occurred aboard a vessel, located upon the navigable waters of the United States, causing injury to seamen. When the Court of Appeals considered Hughes' claim that this Court's decision in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85. 75 S.Ct. 629, 99 L.Ed. 911 and this Court's decision in *Dixilyn Drilling Company v. Crescent Towing & Salvage Company*, 342 U.S. 797, 83 S.Ct. 967, 11 L.Ed. 2d 78 were applicable to the indemnity agreement before the Court, the Fifth Circuit Court of Appeals rejected this contention finding that Louisiana law applied and cited an earlier Fifth Circuit decision in the case of *Dickerson v. Continental Oil Company*, 449 F.2d 1209, Certiorari denied 405 U.S. 934, 92 S.Ct. 942, 30 L.Ed.2d 809.

The *Dickerson* case is clearly inapplicable to the contract for indemnity presented to the Court. In *Dickerson* the accident which gave rise to the claim for indemnity under the contract occurred aboard a stationary platform in the Gulf of Mexico. For this reason the Court in the *Dickerson* case applied to Louisiana law by virtue of the Outer Continental Shelf Land Act, 43 U.S.C.A. Section 1331 et seq. In doing so the Fifth Circuit completely ignored the earlier part of its decision wherein the Court determined that the accident was maritime in nature having occurred aboard a vessel, located on the navigable waters of the United States and causing injury to a seaman. It is respectfully submitted that there is an irreconcilable difference between these two portions of the Court of Appeals opinion as well as an irreconcilable difference between the decision and the earlier decisions of this Court.

As was noted by this Court in *Kossick v. United Fruit* Company, 365 U.S. 731, 81 S.Ct. 886 (1961) "The boundaries of admiralty jurisdiction over contracts — as opposed to torts or crimes — being conceptual rather than spatial, have always been difficult to draw. Precedent and usage are helpful insofar as they exclude or include certain common types of contract . . ." Generally a maritime contract is an agreement which concerns transportation by sea relates to navigation or maritime employment, or involves navigation and commerce on navigable waters (2 C.J.S. Admiralty Sec. 24, Note 23).

The master service contract which governed the relationship between Hughes and ODECO came into effect with the issuance of either oral or written work orders. The services which were provided under the purchase order and master service contract were for the services of a cook aboard the vessel and for maintenance and repair of the vessel known as the round barge. The contract which provides for repair of vessel is clearly maritime in nature, *Kossick v. United Fruit Co., Supra*, at page 890. Even if the Court were to consider the contract one for indemnity and therefore in the nature of insurance the contract remains one which is maritime in nature; *Kossick v. United Fruit Co.*, Supra.

Even if we do not consider the specific acts being performed by the injured parties, Hicks, Glover and Goforth, but rather the general nature of the contract, it should still be considered a maritime contract in that the indemnity being sought is indemnity for an accident which occurred to seamen, aboard a vessel, in navigation upon the navigable waters of the United States. (See the rationale of *In re: Dearborn Marine Service, Inc.*, 499 F.2d 263 (5th Cir. 1934). Although the Fifth Circuit Court of

Appeals did refuse to apply that holding of this Court in *Bisso v. Inland Waterways Corporation* (Supra) it did note that if the *Bisso* case was a controlling precedent it would require a holding that the indemnity clause in the ODECO-Hughes contract was invalid. We respectfully submit that the Court of Appeals was correct in this observation but as we have noted incorrect in its failure to apply the *Bisso* case as ruling precedent.

After determining that the Bisso rule was inapplicable to the Hughes-ODECO contract this court in its original opinion went on to state that the Bisso rule would not be applied to the Hughes-ODECO situation because of the District Court's finding that "Buster Hughes was an experienced company of substantial size, itself. So I find as a matter of fact that there was no policy reason to hold the contract invalid because of the relative size of the companies or position in the market." Such rationale for not applying Bisso to the Hughes-Odeco contract is not logical.

If the Bisso rationale is applicable, the indemnity portion of the Hughes-Odeco contract is invalid as being against public policy. The Court cannot validate a contract which is invalid as against public policy by finding that the parties were of relatively equal size and had dealt at arms length. (See *Dixilyn Drilling Co. v. Crescent Towing & Salvage Co.*, 372 U. S. 697, 38 S.Ct. 967, 10 L.ed. 2d 78) Furthermore, the question of whether or not one of the parties had been overreached in making an indemnity contract is only part of the reasoning wherein the Supreme Court found in Bisso that this type of contract was against public policy. The first, and in all likelihood the primary reason, for application of the rule which allows vessel owners to take advantage of release from negligence contracts is "to discourage negligence by making wrong doers pay damages." (See Bisso at 349 U.S.91)

As is also noted by this Court in the Bisso case, the application of the rule pronounced by this Court in Bisso was ". . . merely a particular application to the towage business of a general rule long used by courts and legislatures to prevent enforcement of release from negligence contracts in many relationships. . . ."

Finally, we respectfully submit that there was no evidence in the record of this matter upon which the District Court or the Court of Appeals could have determined that ODECO and Hughes were companies of relatively equal size and bargaining power. As noted above in Appendix E it is quite clear that the total net worth of Buster Hughes did not even exceed or even meet the value of the round barge involved in this accident. The record clearly establishes that the round barge was only one of many vessels, fixed production platforms, etc. owned by ODECO. In relation to ODECO Hughes could not be classified as anything more than the corner grocery store competing with the Great Atlantic and Pacific Tea Company.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals.

Respectfully submitted,

FRANCIPANE, REGAN
& ST. PEE'
3324 N. Causeway Blvd.
Metairie, Louisiana 70002

Kenneth L. Sanders

Chester Francipane

Wayne H. Scheuermann

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition For Writ of Certiorari have been served on James Holmes, 1815 American Bank Bldg., New Orleans, La., Arthur F. Dumaine, 344 Camp St., New Orleans, La., John M. Lawrence, 2757 Tulane Ave., New Orleans, La., Salvadore E. Gutierrez, Jr., Suite 802, 344 Camp St., and A. Remy Fransen, Jr., 814 Carondelet St., New Orleans, La.

APPENDIX A

CLYDE E. HICKS,
Plaintiff-Appellee,

v.

OCEAN DRILLING AND EXPLORATION COMPANY,
Defendant-Third Party
Plaintiff-Appellant-Appellee,

H. B. BUSTER HUGHES, INC.,
Third Party Defendant-Appellant.

HESTER GOFORTH,
Plaintiff-Appellee,

v.

OCEAN DRILLING AND EXPLORATION CO., et al.,
Defendants-Appellants-Appellees,
H. B. BUSTER HUGHES, INC.,
Defendant-Appellant.

CHARLES NORMAN GLOVER,
Plaintiff-Appellee,

v.

OCEAN DRILLING EXPLORATION CO., et al.,
Defendants-Appellants-Appellees,
H. B. BUSTER HUGHES, INC.,
Defendant-Appellant.

No. 73-2169.

United States Court of Appeals, Fifth Circuit.

May 7, 1975.

Jones Act suits were brought against oil field contractor, which supplied labor crew for submersible oil storage facility, and against the facility owner by crew members who were injured when the facility, due to a removal of ballast, shook, tilted and refloated on its side. Two of the plaintiffs also sought recovery against owner on the basis of Louisiana Civil Code provision requiring one whose fault causes damage to another to repair it. The owner filed cross claims and a third-party action against labor supplier, seeking indemnity under master service contract. Upon consolidation of the actions, the United States District Court for the Eastern District of Louisiana, Jack M. Gordon, J., entered judgment in favor of plaintiffs against facility owner, but resolved the indemnity question in the owner's favor. Upon appeals by the owner and labor supplier, the Court of Appeals, Jones, Circuit Judge, held that (1) the oil storage facility was a vessel with provisions of Jones Act and general maritime jurisdiction, (2) the finding that plaintiffs were borrowed employees of the owner was supported by the evidence, (3) the accident fell within the scope of the indemnity contract's language, (4) a clause purporting to indemnify a vessel owner against its own negligence is not against Louisiana public policy, and (5) indemnitor's obligation, under contract, to secure $500,000 liability insurance coverage was not impliedly reduced to $300,000 by the fact that the indemnitor only secured the lesser amount, and no amendment of the contract was effected by the introduction of the contract in evidence with attached certificate showing coverage of only $300,000.

Affirmed.

1. *Seamen* 29(2)

Purpose for which facility was constructed and business in which it is engaged are the controlling considerations

in determining whether or not the facility is a "vessel" for Jones Act jurisdictional purposes. Jones Act, 46 U.S.C.A. § 688.

See publication Words and Phrases for other judicial constructions and definitions.

2. *Admiralty* 6
Seamen 29(2)

Drilling barges or platforms are "vessels" for Jones Act jurisdictional purposes. Jones Act, 46 U.S.C.A. § 688.

3. *Seamen* 29(2)

Submersible oil storage facility used in connection with offshore drilling was a "vessel" within provisions of Jones Act and general maritime jurisdiction, even though the facility had no motive power in itself. Jones Act, 46 U.S.C.A. § 688.

4. *Seamen* 29(5.14)

In Jones Act suit brought against oil field contractor, which supplied labor crew to owner of submersible oil storage facility, and against owner of the facility by crew members who were injured when the facility, due to removal of ballast, shook, tilted and refloated on its side, the jury finding that plaintiffs were borrowed employees of the facility owner was supported by the evidence.

5. *Indemnity* 8(2)

Accident which occurred when, due to a removal of ballast, submersible oil storage facility shook, tilted and refloated on its side came within scope of agreement wherein supplier of labor for the facility agreed to indemnify the facility owner for claims for damages "incident to, arising out of, in connection with, or resulting from the activities

of subcontractor * * * or in connection with the work to be performed, services to be rendered, or material to be furnished, under this contract."

6. *Master and Servant* 5

Master service contract between owner of submersible oil storage facility and supplier of labor therefor governed and controlled all work by supplier's crew, despite facility owner's claim that the contract applied only in situations where supplier was performing work as an independent contractor, since the contract provisions made it clear that, as between the parties, the supplier was an independent contractor at all times.

7. *Evidence* 455

District court properly refused to admit testimony as to the meaning of "master service contract" between owner of submersible oil storage facility and supplier of a labor crew therefor, where the contract was clear and unambiguous.

8. *Indemnity* 3

Supplier of labor for submersible oil storage facility on which an accident occurred could not avoid indemnity provisions of master service contract between it and facility owner on theory that there was no bargaining or discussion on any contract terms, since one who signs a contract presumptively knows its contents and cannot subsequently avoid its obligations by pleading ignorance.

9. *Contract* 93(2), 99(1)

Party who signs a written instrument or places his mark or allows his mark to be placed thereon is presumed to know its contents, and he cannot avoid the obligations which may be imposed on him by the instrument merely

upon a showing that he did not read it, or did not have it read and explained to him, or did not understand its provisions.

10. *Indemnity* 3

Clause in contract which purported to indemnify vessel owner against its own negligence was not against Louisiana public policy and void.

11. *Insurance* 104(3)

Indemnitor's obligation, under contract, to secure $500,000 liability insurance coverage was not impliedly reduced to $300,000 by the fact that the indemnitor only secured the lesser amount, and no amendment of the contract was effected by the introduction of the contract in evidence with attached certificate showing coverage of only $300,000.

12. *Contracts* 275

No principle of contract amendment, waiver or estoppel relieves a party from a contractual undertaking by the doing of something less than the agreement requires, in the absence of something done by the party to whom the duty is owned.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before JONES, THORNBERRY and COLEMAN, Circuit Judges.

JONES, Circuit Judge:

A New Orleans shipbuilder, Higgins, Inc., constructed at its shipyard on the Industrial Canal in the city, for

Ocean Drilling and Exploration Company, herein called ODECO, a submersible oil storage facility which became known as the Round Barge. This facility is made up of a superstructure two hundred feet in length and fifty-four feet in width constructed approximately forty feet above cylindrical storage tanks fourteen and one-half feet in diameter. Two of the tanks run the entire length of the superstructure. These are connected to four storage tanks evenly spaced and running the width of the superstructure. This rectangular assemblage of tanks forms the lower structure of the Round Barge. There is a continuous fin or skirt five feet in height around the entire under side of the cylindrical storage tanks, specifically designed to sink the structure in a vertical position in the mud floor of the Gulf of Mexico and to hold the facility in a stationary position. The fin was attached to the outer tanks.

The Round Barge was towed from the shipyard where it was constructed to the site in the Gulf where it was then to be used. It was lowered by flooding the tank at one end of the Barge with water. When it had come to rest on the bottom, the tank on the other end was filled and it descended to the floor of the Gulf. In addition to the fin, about half of each of the tanks sank into the mud or silt on the bottom of the Gulf. The two tanks across the end of the Round Barge usually contained water ballast. Sometimes other tanks contained water but those were more often used for the storage of oil. Rock ballast was also used to keep the facility at the bottom of the Gulf.

The Round Barge was attached to a header platform constructed on conventional pilings. Pipelines from producing wells were connected to the header platform, which was conneteed to the Round Barge by Flowlines and a catwalk. By this method oil reached the storage tanks. The

facility was equipped with a galley and quarters for the crew.

Although ODECO claimed, at the trial, that the Round Barge was designed for the place where it was located, it was designed and constructed so that it could be raised for scraping and repair, and could be moved to another site for storage of oil. Consideration had been given to moving it to a different location in the Gulf. The refloating of a facility would be accomplished by disconnecting the catwalk, flowlines and the like from the header platform and then reversing the installation process by pumping out the water ballast, causing the structure to float.

H. B. Buster Hughes, Inc., one of the appellants, is an oilfield contractor. It supplied a labor crew to ODECO for the Round Barge under a master service contract. Clyde E. Hicks, Charles Norman Glover and Hester Goforth, who were plaintiffs in the district court and are appellees in this Court, were members of the crew furnished by Hughes to ODECO. All of their work was done on the Round Barge or on other ODECO facilities. Glover was a cook's helper, Hicks was a roustabout and Goforth was a welder.

Hicks testified that he was paid and employed by Hughes. His immediate superior was a Hughes toolpusher named Shepherd. Hicks usually got his orders from Shepherd, or from Punch, a Hughes Supervisor or Superintendent. Shepherd and Punch received their orders from an ODECO Field Superintendent named Aucoin. When asked if he was permitted to refuse to do what Aucoin told him to do, Hicks stated that he was permitted to quit. He further testified that Shepherd and Punch helped with the work, rather than merely coming by to check on him from time to time.

Goforth testified that he was employed and paid by Hughes. Goforth said that he usually got his orders from Aucoin, even though Punch was present. He was asked if this was not "just because he knew you", and gave the ambiguous response that "yes sir, because I had worked with him so long and for what reason, I couldn't answer that." Goforth related that on one occasion Aucoin had discharged an employee who was on the Hughes payroll. He stated that Aucoin had sometimes countermanded orders given by Punch. Goforth never asked Punch whether he should take orders from anyone else because he knew that Aucoin was "strictly boss over the whole works."

Glover took his instructions directly from a cook who was an ODECO employee.

On the night of April 25, 1971, Larry Braud, the head gauger on the Round Barge and an employee of ODECO, had pumped oil from storage tanks into a tanker. This operation was completed at about 3 a.m. Braud, pursuant to instructions from an ODECO supervisor, put into operation the pumps for removing the salt water ballast from the center line tanks.

About six[1] in the morning of April 26, 1971, the incident occurred from which this litigation arose. Glover had been working. Hicks and Goforth were earning time. The removal of the ballast caused the Round Barge to shake, tilt and to refloat on one side.

Hicks, Goforth and Glover were injured. They brought separate actions under the Jones Act[2] against ODECO. Each alleged the unseaworthiness of the platform and

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[1] Goforth fixes the time at 6:05.
[2] 46 U.S.C.A. § 688.

asserted Maritime Tort claims against ODECO as separate causes of action. Goforth and Glover named H. B. Buster Hughes, Inc. as an original defendant to their Jones Act claims and also sought recovery against ODECO on the basis of Article 2315 of the Louisiana Civil Code which requires one whose fault causes damage to another to repair it. ODECO filed cross claims and a third-party action against Hughes seeking indemnity under the service contract. The three actions were consolidated and tried before a jury. ODECO's indemnity claims against Hughes were reserved for decision by the district judge. Considerable testimony was taken at the trial of the consolidated actions. Much of it was directed to the issues of whether the Round Barge was a vessel and whether the plaintiffs were borrowed servants of ODECO.

At the conclusions of the testimony before the jury, Goforth and Glover dismissed their claims against Hughes.

In addition to giving the conventional jury instructions on burden of proof, negligence, causation and damages, the court gave charges on the tests for determining, among other things, whether a structure or facility is a vessel, whether employees are borrowed servants, whether the plaintiffs were members of the crew of the Round Barge, and for ascertaining whether a vessel is or is not seaworthy.

As to the test for determining whether the Round Barge was a vessel the district court said:

"The primary meaning of the term "vessel," is any water craft or other contrivance used or capable of being used as a means of transportation on water. The term "vessel," may also include, however, various special pur-

pose crafts, such as barges or dredges, which do not operate as a vessel for transportation, but, rather serve as moveable floating bases that may be submerged, so as to rest on the bottom and be used for stationary operations, such as drilling or dredging. Now, although mere flotation may not in and of itself be sufficient to make a structure a vessel, if a structure is buoyant and capable of being floated from one location to another, it may be found to be a vessel, even though it may have remained in one place for a long time and even though there are no plans to move it in the foreseeable future. Now, in considering whether a special purpose craft is a vessel, the determinative factors are the purposes for which the craft was constructed and the business, in which it is engaged. That is, was the craft designed for and used in navigation or commerce? A craft not designed for navigation and commerce, however, may be classified as a vessel, if at the time of accident, it had actually been engaged in navigation or commerce. Now in considering whether a special purpose craft is a vessel, the manner, in which a party or parties may have referred to or denominated such craft in contracts or other documents is not necessarily determinative of its status as a vessel, but is simply a factor for you to consider along with all the other evidence."

The borrowed servant doctrine, as here applicable, was thus stated by the district court in its charge to the jury:

"Now, the various criteria have been considered in determining when the doctrine of borrowed servant is applicable. While no one of these factors or any combination of them is decisive and no fixed test is used to determine the existence of a borrowed servant relationship, certain guidelines have been given great weight. The most universally accepted standard for determin-

ing whether a person is a borrowed servant is to ascertain who controls him in that employment and who has the power and the right to control and direct him in the performance of his work. In order to establish that the employee is the borrowed servant of another, the plaintiffs may establish, among other possible elements of proof, that the borrowing employer exercises control over the employee and has the right to control him. They may establish that the general employer has relinquished the right to control. They may establish that the borrowing employer has assumed the obligation for the payment of the employee's wages. They may establish that the employee is performing work for the borrowing employer and in the latter's business. They may establish that the temporary or borrowing employer has furnished the necessary instrument and the place of performance for the work in question. Now, although a formal agreement between the employers, that is ODECO and H. B. "Buster" Hughes, Incorporated, is not indispensible, the existence or non-existence of such an agreement should be considered. In considering whether the power exists to control and direct an employee, a careful distinction must be made between authoritative action and control on the one hand and mere suggestions as to detail or necessary cooperation, where the work furnished is part of a larger undertaking. On the other hand, cooperation as distinguished from subordination is not enough to create the employment relationship necessary to activate the borrowed servant doctrine."

The court told the jury that if it found that the Round Barge was a vessel and that the plaintiffs were members of the crew of the vessel or performed functions traditionally performed by seamen it would become necessary to

determine whether the Round Barge was unseaworthy in one or more respects. If it was manned by an incompetent crew at the time of the accident, or was improperly equipped by the lack of safety devices it could be found unseaworthy, and if unseaworthiness be found, it must also be found that it was a proximate cause of the injuries.

None of these jury instructions were challenged by the defendants. In response to specific interrogatories the jury found that the plaintiffs were borrowed servants of ODECO, that they were members of the crew of the Round Barge, that the Round Barge was a vessel, that ODECO was negligent, that its negligence was a cause of or contributed to the plaintiff's injuries, that plaintiffs were members of the crew or performed work on the Round Barge which work is traditionally performed by seamen, that the Round Barge was unseaworthy, that the unseaworthiness of the Round Barge was a proximate cause of plaintiffs' injuries, and that ODECO's negligence was the proximate cause of the plaintiff's injuries.

The jury returned a verdict against ODECO for Hicks in the amount of $177,000, in favor of Goforth for $212,000 and in favor of Glover for $90,000.

Following the jury trial on the issues of liability and damages the court, without a jury, tried the indemnity claim of ODECO against Hughes. The cause of action was based upon the indemnity provisions of a Master Service Contract between ODECO and Hughes. In this instrument ODECO is referred to as "Drilling Contractor" and Hughes is designated as "Subcontractor."

The indemnity provision reads,

"Subcontractor agrees to indemnify and hold harm-

less Drilling Contractor from and against any and all liens and claims for labor or material, and against any and all claims, demands, or suits for damages to persons and/or property (including, but not limited to claims, demands, or suits for bodily injury, illness, disease, death, loss of services, maintenance, cure, property or wages), which may be brought against Drilling Contractor (including, but not limited to those brought by Subcontractor's employees and agents and the agents and employees of its subcontractors) incident to, arising out of, in connection with, or resulting from the activities of Subcontractor, its employees and agents, or its subcontractors and their employees and agents, or in connection with the work to be performed, services to be rendered, or material to be furnished, under this contract, or under contracts referred to in 1(b) above, whether occasioned, brought about or caused in whole or in part by the negligence of Drilling Contractor, its agents, directors, officers, employees, servants or subcontractors, or otherwise, or by the unseaworthiness of any vessel owned, operated or controlled by Drilling Contractor, regardless of whether such negligence or unseaworthiness be active or passive, primary or secondary."

Attached to the Master Service Contract was a certificate of insurance which insured Hughes to the extent of $300,000 against its liability under the contract. The insurance policy was not incorporated in or referred to in the service contract.

The district court resolved the indemnity question for ODECO and against Hughes. Post-trial motions were denied, judgments for the several plaintiffs were rendered against ODECO for the amounts of the verdicts. Judg-

ment for the full amount of these recoveries was rendered in favor of ODECO and against Hughes. ODECO and Hughes have taken separate appeals.

ODECO, on this appeal, asserts that the finding of the jury that the Round Barge was a vessel was not supported by the evidence. It compares the Round Barge to a drydock and directs the court's attention to those precedents which hold that a dry dock is not a vessel for maritime jurisdiction. See Atkins v. Greenville Shipbuilding Corporation, 5th Cir. 1969, 411 F.2d 279, where it was held that flotation was not enough to constitute a structure a vessel. It was said that a drydock is not a vessel any more than is a wharf or warehouse when projecting into or upon the water. The distinction, as noted in the Atkins case, is the absence of the element of risk and the hazards of the sea. The Round Barge was not attached to the shore and had full exposure to the risks and hazards of the sea. The contention of ODECO is that the connection of the Round Barge to the header platform, which was constructed on conventional pilings, was the equivalent of the shore attachment of a drydock. The comparison is not well taken. The bottom of the Gulf is not shore and the catwalk and flowlines did not secure the one structure to the other. The Round Barge is not comparable to a stationary platform as ODECO suggests.

[1, 2] This court recently stated that the purpose for which a facility was constructed and the business in which it is engaged are the controlling considerations in determining whether or not the facility is a vessl. Cook v Belden Concrete Products, Inc., 5th Cir. 1973, 472 F.2d 999, cert. den., 414 U.S. 868, 94 S.Ct. 175, 38 L.Ed.2d 116 in that case a flat-deck barge which was moored alongside a concrete yard and used as a construction platform was held

as a matter of law not to be a vessel. The barge had no motive power of its own. It was submersible so as to permit launching of finished barges. Upon completion of a set of barges, the platform would be towed to deeper water for launching. It would sometimes be moved to different positions along the dock to pick up materials. At the time of the injury which gave rise to the action the platform was secured to the dock by ropes. The district court granted summary judgment in favor of Belden, the employer. The issue on appeal was whether as a matter of law the platform was a vessel for purposes of maritime jurisdiction. The appellant cook attempted to distinguish the platform from a drydock because of the platform's limited movement. The court rejected this approach. It stated that permanence of fixation is not the criterion which governs the maritime status of floating drydocks and similar structures. The court stated that,

> "Conventional ships and barges as well as such unconventional craft as submersible drilling barges and floating dredges which are designed for navigation and commerce are vessels within general maritime and Jones Act jurisdiction and retain such status even while moored, dry-docked, or otherwise immobilized and secured to land." 472 F.2d 999, 1001.

The Round Barge of this case is very similar to a submersible drilling barge or platform, one of the unconventional craft referred to in the foregoing quotation. Such structures are vessels for Jones Act jurisdictional purposes.

A submersible drilling barge, like the Round Barge, has no motive power in itself but is capable of being moved through navigable water under tow. When in use for drilling for oil or gas the drilling barge rests, as does

the Round Barge, on the bottom of the Gulf. Like the Round Barge it has a galley and quarters for its crew. On occasions this Court has held that a submersible drilling barge is a vessel. Offshore Company v. Robison, 5th Cir. 1959, 266 F.2d 769; Producers Drilling Company v. Gray, 5th Cir. 1966, 361 F.2d 432. Both of the cited cases were for personal injuries sustained by an employee working on the structure while it was resting on the bottom of navigable waters. Both were Jones Act cases. In the Offshore case the court observed that the Jones Act had been extended to cover "Almost any structure that once floated or is capable of floating on navigable waters" and that the word "vessel" includes "special purpose structures not usually employed as a means of transport by water but designed to float in water . . ." 266 F.2d 769, 711, 779.

In the Producers case the court said,

> "It is well settled that a barge may be a vessel. . . ." Here we have a special purpose barge designed to serve as a mobile drilling platform. At the time of the accident, the barge was being used for that purpose. The barge is equipped for use in navigable waters, had traveled a considerable distance through such waters to its present site and was, at the time of the accident, located in a navigable canal." 361 F.2d 432, 437.

We only need to change "mobile drilling platform" to read "oil storage facility" and the language applies to the Round Barge.

[3] The evidence was more than adequate to support the jury's finding that the Round Barge was a vessel within the provisions of the Jones Act and the general maritime jurisdiction. It is not unlikely that a determination

could be made that the Round Barge was a vessel as a matter of law if such a ruling was appropriate.

[4] ODECO contends that the jury finding that Hicks, Goforth and Glover were borrowed employees of ODECO was not supported by the evidence. The evidence warranted the submission of employment status to the jury. The court's instruction, to which no exception was taken, fully and fairly stated the applicable law. Dugas v. Pelican Construction Company, Inc., 5th Cir. 1973, 481 F.2d 773, cert. den., 414 U.S. 1093, 94 S.Ct. 723, 38 L.Ed.2d 550; Ruiz v. Shell Oil Co., 5th Cir. 1969, 413 F.2d 310. ODECO's position is without sound basis.

The other contentions of ODECO have been considered. They need not be discussed. They are without merit.

[5] The district court granted indemnity in favor of ODECO against H. B. Buster Hughes, Inc., for the full amount of the judgments in favor of Hicks, Glover and Goforth. The court stated that the Master Service Contract between ODECO and Hughes was in effect, that it governed the relationship of ODECO and Hughes at the time of the accident, and paragraph 9 of the contract entitled ODECO to indemnity. Hughes contends that ODECO is not entitled to indemnity because the negligence was not, nor was the accident itself related in any way to the activities of Hughes as required by the indemnity paragraph. Hughes asserts that the accident arose out of activities exclusively under the control of ODECO, that there was no work of Hughes being performed at the time of the negligent acts or the occurrence of the accident, and that the accident did not occur at a place prescribed by work orders. The interpretation which Hughes urges is too narrow. Hughes agreed to indemnify ODECO for claims for

damages "incident to, arising out of, in connection with, or resulting from the activities of subcontractor . . . or in connection with the work to be performed, services to be rendered, or material to be furnished, under this contract. . . ." The accident within the scope of the quoted language.

[6] Hughes contends that the Master Service Contract Contract applies only in situations where Hughes is performing work as an independent contractor. Paragraph 13 of the contract is as follows:

> "Subcontractor shall be an independent contractor with respect to the performance of all work hereunder, and neither Subcontractor nor anyone employed by Subcontractor shall be deemed for any purpose to be the employee, agent, servant, or representative of Drilling Contractor in the performance of any work or service or part thereof in any manner dealt with hereunder. Drilling Contractor shall have no direction or control of the Subcontractor or its employees and agents except in the results to be obtained. The work contemplated herein shall meet the approval of Drilling Contractor and be subject to the general right of inspection for Drilling Contractor to secure the satisfactory completion thereof. The actual performance and superintendence of all work hereunder shall be by Subcontractor, but Drilling Contractor or its representatives shall have unlimited access to the operations to determine whether work is being performed by Subcontractor in accordance with all the provisions of this Contract and the work order."

[7] The district court rejected this contention as a "grossly erroneous interpretation of the contract" and construed paragraph 13 as establishing that, as between

Hughes and ODECO, Hughes was an independent contractor at all times. The court stated that the scope of the contract was set forth in paragraph 1(a), where it was provided that the contract should govern and control all work by Hughes. The district court deemed it unnecessary to determine whether Hughes was an independent contractor in relation to Hicks, Goforth and Glover. In support of its contention that evidence should have been admitted as to the interpretation of the contract, Hughes relies primarily upon Tidewater Oil Company v. Travelers Insurance Company, 5th Cir. 1972, 468 F.2d 985, and Warren Petroleum Corporation v. J. W. Green Contractors, 5th Cir. 1969, 417 F.2d 242. In each of the cited cases before us the provision is unambiguous. There is no need to look beyond the instrument to determine the intent of the parties. The district court was correct in refusing to admit testimony as to the meaning of the contract.

[8, 9] Hughes next asserts that the contract was invalid because there was no meeting of the minds. It says that there was no bargaining or discussion on any of the contract terms, that Hughes was given no opportunity to reject the indemnity provisions short of rejecting all work for ODECO, that the parties differ on their interpertation of the contract, and that there was no explanation of any of the contract terms. This contention can be disposed of by a brief statement of the Louisiana Court of Appeals which states the controlling rule in these terms:

> "A party who signs a written instrument, or who places his mark or allows his mark to be placed thereon, is presumed to know its contents, and he cannot avoid the obligations which may be imposed on him by that instrument merely upon a showing that he had not read

it, or that he had not had it read and explained to him, or that he did not understand its provisions." St. Landry Loan Co., Inc. v. Avie, La. App.1962, 147 So.2d 725, 727.

[10] Hughes urges that a clause in a contract which purports to indemnify a vessel owner against its own negligence is against public policy and void. The basis for its position is found in Bisso v. Inland Waterways Corporation, 349 U.S. 85, 75 S.Ct. 629, 99 L.Ed. 911. If the Bisso case is a controlling precedent it would require a holding that the indemnity clause in the ODECO —Hughes contract was invalid. However, Bisso involved a towing contract governed by the maritime law. The indemnity clause in the contract before us is to be construed under the law of Louisiana, and being so construed it is not in violation of public policy. Dickerson v. Continental Oil Co., 5th Cir., 449 F.2d 1209, cert. den., 405 U.S. 934, 92 S.Ct. 942, 30 L.Ed.2d 809.

In Bisso v. Inland Waterways Corporation, supra, one of the reasons given for the rule there adopted was "to protect those in need of goods or services from being overreached by others who have power to drive hard bargains." 349 U.S. 85, 91, 75 S.Ct. 629, 633, 99 L.Ed. 911. Hughes would have such protection as this might give him. It is unnecessary to consider the reason for a rule which is inapplicable to a case under consideration, but if it were otherwise Hughes could not prevail. The district court stated, "Buster Hughes was an experienced company of substantial size, itself. So I find as a matter of fact that there was no policy reason to hold the contract invalid because of the relative size of the companies or position in the market." We accept this determination of the trial court.

[11, 12] The final contention of Hughes is that the recovery against it by ODECO, if any, should be limited to $300,000. The Master Service Contract provides, in part, that:

> "At any and all times during the term of this Agreement, Subcontractor agrees to carry insurance of the types and in the minimum amounts as follows:
>
> * * *
>
> "Comprehensive general liability insurance with minimum limits of $100,000.00 for injury to or death of any one person and $500,000.00 for any one accident and with minimum limits of $300,000.00 for property damage. Such insurance shall additionally cover the contractual liabilities and indemnities herein assumed by Subcontractor with minimum limits of $500,000.00."

Attached to the contract between ODECO and Hughes, when it was put in evidence by ODECO, was a certificate of insurance providing for $300,000 liability coverage. The liability of Hughes is no more than the amount of insurance required by the contract. Dickerson v. Continental Oil Company, supra. Hughes reasons that the certificate showing insurance of a lesser amount than provided in the contract, and the introduction of the contract in evidence with the certificate attached effected an amendment to the contract. We have not been referred to any principle of contract amendment, waiver or estoppel which relieves a party from a contractual undertaking by the doing of something less than the agreement requires in the absence of something done by the party to whom the duty is owed. ODECO is entitled to recover for the full amount of the judgments against it.

No reversible error has been shown. The judgments of the district court are Affirmed.

APPENDIX B

Neither law nor policy forbids the regular user of contract labor from requiring that, in the interest of certainty and uniformity, vicarious liability be on the supplier and the supplier fix his contract hiring rate accordingly and insure against it if he desires. Conversely, the parties may agree for vicarious liability to fall on the user. Insofar as the furnished workman is under traditional tests a borrowed servant, the allocation of ultimate responsibility can be in terms of indemnity or of the employee being treated as the servant of one party or the other." Obviously, the Fifth Circuit recognized the wish to eliminate the uncertainty that I have been referring to and as I say, I think the parties in this case did eliminate the uncertainty by Paragraph 9 of the agreement and Paragraph 13.

Now, with regard to the validity of the indemnity agreement, it has been contended by Buster Hughes for various reasons the indemnity agreement would be invalid. There has been suggestion in connection with the memorandum for summary judgment several weeks ago that the overwhelming economic power of ODECO was such that the Court should consider the clause invalid. I do not consider this to be the case. I consider particularly the fact that it was an insured risk; that it could be taken into account in fixing the rates. There was no requirement that Buster Hughes carry out any particular work, if it didn't wish to under the contract. Buster Hughes was an experienced company of substantial size, itself. So I find as a matter of fact that there was no policy reason to hold the contract invalid, because of the relative sizes of the companies or position in the market. With regard to the validity of Louisiana law of such an agreement, I feel that this is completely and adequately covered by a recent decision in Civil

Action 72-745, Section "C" of this Court entitled *Calvin Day versus Ocean Drilling and Exploration Company*, in which Judge Alvin Rubin thoroughly considered Louisiana law and concluded that there was nothing in the law to presumably involve an almost identical, if not identical contract to prevent the parties from fixing economic risks and hazardous enterprises as they have done in this contract, so without repeating Judge Rubin's ruling, I adopt it as my own. I independently reached the conclusion that it is a sound statement of the law of Louisiana and that it is applicable in this case. Thus, I find the indemnity agreements contained to be valid, the contract to be applicable to the work, and therefore, I order that judgment be entered in Civil Action No. 71-1928 in favor of Ocean Drilling and Exploration Company as third-party plaintiff against H. R. "Buster" Hughes, Incorporated as third-party defendant for the amount of judgment as awarded by the jury; that in case 71-2806 entitled Hester Goforth versus Ocean Drilling and Exploration Company and H.B. Buster Hughes, Inc., I find in favor of Ocean Drilling and Exploration Company as cross-complainant against H. B. "Buster" Hughes, Incorporated and order that judgment be entered for the amount the jury awarded to Hester Goforth and in Civil Action No. 71-2857 entitled Charles Norman Glover versus Ocean Drilling and Exploration Company and H. B. "Buster" Hughes, Incorporated, I find in favor of Ocean Drilling and Exploration Company as cross-claimant against H. B. "Buster" Hughes, Incorporated, and order that judgment be entered for the amount the jury as awarded to the plaintiff.

I deny any award in any other case for attorneys fees and order the judgment be entered accordingly.

Gentlemen, I might have omitted some minute item that I need to clean up—

MR. CHRISTOVICH: No, sir. As I understand it, demand for the attorneys fees is denied in those cases and demand for costs, as well, that's granted with respect to those three cases?

THE COURT: The costs will be awarded, but attorneys fees are denied.

MR. FRANCIPANE: If Your Honor please, are you going to enter written reasons?

THE COURT: No, Judgment will simply be incorporating the jury's verdict plus this. If you will recall at the

APPENDIX C

U.S. COURT OF APPEALS—FILED JUNE 4, 1975
Edward W. Wadsworth, Clerk

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 73-2169

CLYDE E. HICKS, Plaintiff-Appellee,

v.

OCEAN DRILLING AND EXPLORATION COMPANY,
Defendant-Third Party Plaintiff-Appellant-Appellee,

H. B. BUSTER HUGHES, INC.,
Third Party Defendant-Appellant.

HESTER GOFORTH, Plaintiff-Appellee,

v.

OCEAN DRILLING AND EXPLORATION CO., et al.,
Defendants-Appellants-Appellees,

H. B. BUSTER HUGHES, INC.,
Defendant-Appellant.

CHARLES NORMAN GLOVER, Plaintiff-Appellee,

v.

OCEAN DRILLING EXPLORATION CO., et al.,
Defendants-Appellants-Appellees,

H. B. BUSTER HUGHES, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(June 4, 1975)

Before JONES, THORNBERRY and COLEMAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

APPENDIX D

Section 2, Clause 1. Jurisdiction of Courts

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 § 1333

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize. June 25, 1948, c. 646, 62 Stat. 931; May 24, 1949, c. 139, § 79, 63 Stat. 101.

APPENDIX E

(144)

A Yes.

Q By whom, if you know, was Larry Braud employed in April 1971?

A By ODECO.

Q Now, the value of this round barge, approximately—I'm talking about the construction of the round barge, itself, how much was that?

A Something short of a million dollars, I would guess.

Q And when the round barge was built, it was built at the shipyard and then it was launched and then other construction was performed after the launch. I want to find out when it was handed over to you folks, to ODECO.

Did it have on it not only the tanks and the basic platform, but, also the living quarters and the equipment and most of the machinery in a complete state when it was handed over to you?

A Yes.

Q Now, the purpose of the round barge is for the storage of oil and also, for the housing of crews, isn't that true?

A Yes, once it's on location, that's correct.

Q Now, this round barge, when it comes out of the

shipyard and after the equipment is all put on its and the

[83] 91 [84]

letter identified by the witness as signed by Darrell Kline as ODECO-14.

THE COURT:

How about the other document, do you want to offer it?

MR. HOLMES:

Yes, sir. We would offer the construction contract identified by the witness by his signature as ODECO-15. We ask leave of Court to make a copy of the contract, as this is the only copy we have.

THE COURT:

Any objection?

MR. FRANCIPANE:

No, sir.

THE COURT:

It's ordered that ODECO-14 and 15 be admitted into evidence with permission being granted to substitute a copy for the originals of each.

BY MR. FRANCIPANE:

Q Mr. Hughes, just a couple of questions. Do you know what H. B. "Buster" Hughes, Inc., is capitalized at, approximately?

A The net worth of H. B. "Buster" Hughes, Incorporated, at that time, was around $450,000.00.

Q Mr. Hughes, I'm going to ask you not to give me an

[42] 45 [43]

Q I ask you again to look at this and tell us what the date of that contract was, sir?

A October 8, 1970.

Q Was there a master service contract signed by Buster Hughes and ODECO prior to this one?

A I don't recall. I mean, I couldn't say for sure.

Q Could Buster Hughes have done any work for ODECO, had they not signed this agreement, so far as you know?

A I understood from Mr. Dagley that we would not be able to do any work, unless we signed the contract.

Q Did you confer with Mr. Dagley about that particular thing at the time the contract was signed?

A He had discussed with me prior to signing it, yes.

Q All right, sir. Now, have you read the contract, sir?

A Yes, sir.

Q Did you read it when it was signed?

MR. CHRISTOVICH:

We object, if Your Honor please on the basis of relevancy. As to whether or not this gentleman read the contract at the time it was signed, we have a stipulation that the vice-president of this company was authorized to

execute the contract and did execute the contract and now if this testimony is for the purpose of showing some sort of misconception on the part of some other officer of Buster Hughes, we

[102] 113 [103]

Q Do you know, sir, if ODECO could do any—pardon me.

Do you know if H. B. "Buster" Hughes, Inc., could do any work for ODECO without having signed one of these master service contracts?

A The best as I know—the best as I understand, I don't think we could, but I'm not a judge of that.

Q Now, I show you the contract again and ask you who signed the contract for ODECO?

A Aldon—I can't read the name.

Q Well, let me ask it this way: Was Mr. Aldon LaBorde present when you were there to sign this contract?

A No, sir.

Q Was this contract signed by ODECO at the time you signed it?

A I don't remember. It wasn't signed in my presence, but I don't remember whether it was signed prior to or not, but I know it wasn't signed while I was there.

Q If this is Mr. LaBorde's signature, did you have any

conversation with Mr. LaBorde as to the understandings and meanings of the language in the contract?

MR. HOLMES:

Your Honor, that's totally irrelevant.

THE WITNESS:

I never talked to Mr. LaBorde.